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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re J.B. et al., Persons Coming Under the
Juvenile Court Law.

SAN JOAQUIN COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

A.B.,

Defendant and Appellant.

C087126

(Super. Ct. Nos.
STKJVDP20140000267, J06931)

Mother of the minors, J.B. and I.B., appeals from the juvenile court's order terminating her parental rights and adopting a permanent plan of adoption. (Welf. & Inst. Code, §§ 366.26 & 395.)¹ Mother contends the court erred in failing to apply the beneficial parental relationship exception to adoption. (§ 366.26, subd. (c)(1)(B)(i).)

¹ Undesignated statutory references are to the Welfare and Institutions Code.

Mother further contends the court improperly received and considered evidence and denied her the opportunity to fully address that evidence, and any failure to object was the result of ineffective assistance of her counsel.

We conclude the juvenile court did not err in finding the beneficial parental relationship exception did not apply. As to the second contention, we conclude the juvenile court properly considered all the evidence and did not deny mother's counsel the opportunity to address the evidence. Finally, her claim of ineffective assistance of counsel fails because she has not demonstrated prejudice from any failure to object. The juvenile court's orders are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND²

Mother has three children, six-year-old Jo.B., seven-year-old I.B., and eight-year-old J.B. (sometimes collectively referred to as the minors), with father J.B., Sr.³ At the time of the minors' removal, Jo.B. lived with mother, the maternal uncle, and the maternal grandmother, while his two older brothers, I.B. and J.B., lived with the paternal grandmother. Father was serving a sentence in state prison for a 2012 robbery conviction.

Mother came to the attention of the San Joaquin County Health and Human Services Agency (Agency) on August 22, 2014 after school officials discovered mother intentionally burned Jo.B. on the arm with a flatiron and then failed to provide any medical care to Jo.B. telling him, "it's a secret" and, "don't tell anyone" or she would "go to jail." When Jo.B. told the maternal grandmother what happened, she said, "Well it

² Portions of the factual and procedural background are taken from our opinion in mother's prior appeal, case number C083036, a copy of which was made part of the appellate record.

³ While Jo.B. was included in the dependency proceedings, he is not a subject of this appeal and will be discussed only when relevant.

was your fault” for touching mother’s personal things. Jo.B. reported mother had physically abused him in the past, slapping him and striking him with a phone charger cord on his arms and legs and leaving marks and bruises.

Minors J.B. and I.B. told authorities they both lived with their paternal grandmother but occasionally visited mother. Both minors reported physical abuse by mother in the past.

Mother denied intentionally burning Jo.B., telling the social worker the flatiron burn was accidental. When confronted with the fact mother’s story was not consistent with Jo.B.’s burns, mother denied burning him on purpose. Mother was subsequently arrested and charged with felony child abuse.

The maternal grandmother told investigators mother had anger issues and had been hospitalized several years ago due to depression and being suicidal, but was currently stable and was no longer depressed. The maternal grandmother denied having a criminal history, but acknowledged a past history with Child Protective Services (CPS) and mother had been removed from her when mother was a child.

The paternal grandmother told investigators mother “is cruel to them [the minors].” The paternal grandmother stated she had to fight for visitation rights because mother would not allow her to see her grandchildren. She stated she had visitation rights as to J.B. and I.B. pursuant to a San Joaquin County Family Court order issued in 2012, and both children had been staying with her full-time for the past several weeks. The paternal grandmother expressed interest in taking care of all three minors, and confirmed she had no criminal or CPS history. She also confirmed the minors’ father was serving a sentence in state prison and was not due to be released until 2015.

Dependency Petition

On August 27, 2014, the Agency filed a petition pursuant to section 300, subdivisions (b), (g), and (j), alleging Jo.B., J.B., and I.B. were at substantial risk of serious physical harm and neglect due to mother’s physical abuse and her failure to

provide support due to her incarceration. The petition alleged mother intentionally burned Jo.B. and had physically abused him and his two siblings in the past, mother was currently incarcerated and unable to provide care and support for the minors, and father had a criminal record and history of drug abuse and was incarcerated and unable to provide care and support for the minors.

Detention

The detention report filed August 27, 2014 noted the Agency's concern mother denied purposefully burning Jo.B., and had anger management issues, mental health issues, and possible drug abuse (methamphetamine) issues.

At the August 28 and 29, 2014 detention hearing, the juvenile court ordered all three of the minors detained and temporarily placed them with the paternal grandmother. The court further ordered that there be no contact between mother and the minors without the Agency's consent.

Jurisdiction

The jurisdiction and disposition report filed October 20, 2014 noted mother had pleaded guilty to the felony child abuse charge and been released from county jail,⁴ and was currently living with the maternal grandmother. Mother reported she was struggling with anxiety, and stated she wanted the minors to remain with the paternal grandmother, whom she described as a "good woman." All three minors told the social worker "they love and miss their mother and would like to see her."

The report detailed mother's self-reported childhood physical and sexual abuse and neglect by her parents. She was removed from her parents' custody and raised by her maternal grandmother. Her parents failed to complete reunification services and her

⁴ The record reflects that, on October 10, 2014, mother was convicted of willful infliction of cruel or inhuman corporal punishment on a child (Pen. Code, § 273d, subd. (a)) and granted five years of probation with six months in county jail.

father was a homeless drug addict with whom she periodically used drugs. Mother reported her relationship with the minors' maternal grandmother was plagued with verbal conflict and physical violence, some of which had occurred in front of the minors.

The report noted mother had been diagnosed with depression while in custody. When asked whom she would like to be considered for placement of the children, mother indicated she wanted the minors to remain with the paternal grandmother.

Mother reported she last used marijuana five months prior and last used methamphetamine "a year or two ago." She claimed her peak use of methamphetamine was at the age of 20, when she used "a couple of times per month." The report stated mother had a clear substance abuse problem from which she failed or refused to rehabilitate despite her assertions she is "not an addict" and can stop using drugs whenever she wants.

Mother told the social worker on October 9, 2014 that she needed housing assistance because she did not have stable housing and was "almost homeless." She also felt she could benefit from counseling and parenting classes. Mother stated she wanted to reunify with the minors and was willing to do whatever was necessary; however, she expressed concern that "taking a deal" in her criminal case would jeopardize reunification. The report noted now that mother was no longer incarcerated, "a visitation schedule will be forthcoming."

The Agency requested that the juvenile court sustain the allegations in the amended petition that included new allegations regarding mother's substance abuse history, her current drug use, and her "mental health issues which have gone undiagnosed and untreated until her incarceration." The Agency further recommended both maternal and paternal grandmothers be granted reasonable visitation with the minors.

At the contested jurisdictional hearing on December 5, 2014, the juvenile court sustained the allegations in the amended petition and adjudged the minors dependent children of the court.

Dispositional Hearing

At the December 18, 2014 dispositional hearing, the court found by clear and convincing evidence the minors should be removed from mother's custody and committed to the care, custody, and control of the Agency for appropriate placement. The court ordered reunification services for mother and authorized a psychological evaluation.

On March 27, 2015, the court granted the Agency discretion to increase mother's visitation with the minors.

Six-Month Status Review

The status review report dated April 30, 2015 stated mother was living in the home of the maternal grandmother and was actively seeking employment. The minors were placed together in the home of the paternal grandmother. Mother was visiting the minors twice a week at the paternal grandmother's home. The Agency deemed the minors adoptable, noting the paternal grandmother was willing to adopt if reunification with mother failed.

The minors were adjusting well in the home of the paternal grandmother. The report noted mother had "come a long way" since removal of the minors, completing the parenting program and becoming more confident in her abilities in class. Mother progressed well in class and had perfect attendance. She was also actively participating in individual counseling and had "demonstrated significant active knowledge of her child's needs and her commitment to be a better parent in the future." Mother was processing her childhood abuse and prior domestic violence situations and had completed 16 of 20 counseling sessions. She was attending outpatient group drug treatment and, although she "rarely participates" in group sessions, she had a good attitude and was making progress in her treatment. She was also focused on being self-sufficient and independent in order to give her children a better life.

Gary L. Cavanaugh, M.D., conducted a psychological evaluation of mother on January 26, 2015 and diagnosed her with “Mixed Disorder of Personality with Borderline and Co-Dependent Traits. Mood Disorder, Unspecified; possible recurrent major depression vs bipolar disorder vs substance-induced mood disorder. Attention Deficit Hyperactivity Disorder, Combined Type.” Dr. Cavanaugh opined mother’s personality problems would be best addressed in a structured chemical dependency program with individual therapy, and she would need to follow up with a psychiatrist for her mood disorder. According to the report, mother was receiving all of the services recommended by Dr. Cavanaugh.

Mother was reportedly making “great strides to change her lifestyle” and making “appropriate lifestyle changes to reunite with her children.” She was seeking employment so that she could move out of the maternal grandmother’s home and into her own home without relying on aid. Mother was visiting the minors consistently and spending quality time with them. The Agency recommended mother receive six additional months of reunification services.

At the April 30, 2015 six-month review hearing, the court adopted the findings and orders as recommended by the Agency, continued mother’s reunification services for an additional six months, and gave the Agency discretion to allow overnight visits in consultation with minors’ counsel once mother obtained housing. The court found by clear and convincing evidence the minors could not be returned to mother’s custody without a substantial risk of detriment to their physical and emotional well-being, but there was a substantial possibility the minors would be returned to mother’s custody within the extended time period.

12-Month Status Review

According to the 12-month status review report, mother was still living in the home of the maternal grandmother. The minors remained together in the home of the paternal grandmother. Mother continued to be in compliance with her case plan.

While she was having a challenging time finding employment due to her criminal record, she remained focused on obtaining a job so she could obtain her own housing. J.B. and I.B. stated their desire to continue to live with their paternal grandmother until mother was able to do so. The social worker was concerned that, while mother was actively seeking employment, she was comfortable living with the maternal grandmother and was not utilizing her time wisely or “putting the time in that it takes to land employment.”

Mother continued consistent visitation with the minors three times a week (three hours on Tuesdays at the paternal grandmother’s home and five hours on Saturdays and Sundays at the maternal great-grandmother’s home or the park). However, the social worker was concerned that overnight visits with the minors had not yet begun because mother was still living with maternal grandmother. Mother also faced challenges arriving on time for visitation and returning the minors to the caretaker’s home on time. Mother stated these challenges were due to the fact she relied on a friend for transportation. The social worker informed mother to “manage her time wisely and take the bus.”

Mother continued to work on reunification, having completed the Child Welfare Parenting Program and 20 individual counseling sessions, plus 5 additional sessions to process and deal with one of the minor’s ADHD diagnosis. Mother was gaining a sense of control over her life, learning parenting techniques, and fully participating in her plan. She successfully completed an alcohol and drug outpatient program and it was anticipated she would complete drug court within two months. She also completed an alternative work program. She was receiving mental health services and taking medication to help with her depression and anxiety. The Agency requested that the juvenile court grant mother six more months of reunification services.

At the October 29, 2015 review hearing, the court adopted the findings and orders as recommended, including that mother had “consistently and regularly contacted and visited with the [minors],” “made significant progress in resolving the problems that led

to the [minors'] removal from the home,” and “demonstrated the capacity and ability both to complete the objectives of her treatment plan and to provide for the [minors'] safety, protection, physical and emotional well-being and special needs.”

18-Month Status Review

The 18-month status review report filed February 2, 2016 stated the Agency had “serious concerns” regarding mother’s commitment to her sobriety and her ability to care for her three children. Since the filing of the previous report, “mother has significantly destabilized.” The drug court social workers reported mother was not attending meetings and tested positive for methamphetamine on October 23, 2015, December 11, 2015, and January 29, 2016. Social worker Peggy Gann stated mother had been in drug court for one year and, although she was provided with “resources for shelters for a safe place to stay . . . she doesn’t follow through.” Social worker Beatriz Lopez stated mother failed to provide any record of attending meetings and, if mother failed to do so for the next scheduled appointment, Lopez would recommend mother be terminated from drug court. Mother told the social worker on January 28, 2016 she would “try to get back into drug court and do what I need to do.”

Mother continued to “live a transient lifestyle” and, despite having been provided with multiple housing resources and homeless shelters, she did not follow through with those referrals and continued to lack safe and suitable housing.

Mother was visiting the minors for five hours every Saturday and Sunday and two to three hours every Tuesday at the maternal great-grandmother’s home.

All three minors continued to be placed with the paternal grandmother. J.B. stated, “I don’t want to be removed from my grandma’s care and I don’t want to go to a foster home.” I.B. stated, “My grandma said that my mom isn’t doing so well and we will not go back with her [(mother)].”

The Agency recommended termination of mother’s services, concluding it was not in the minors’ best interest to extend services to mother any longer.

At the March 22, 2016 contested review hearing, the court adopted the recommended findings and orders, terminated mother's reunification services, ordered visitation as arranged through the social worker, and set the matter for a selection and implementation hearing.⁵

Section 366.26 Report and Contested Hearing

The section 366.26 report stated Jo.B. had been placed in a group home due to his severe behavioral issues, while J.B. and I.B. continued their placement with the paternal grandmother. Due to some emotional distress caused by the removal of Jo.B., additional counseling was being arranged for J.B. and I.B. Mother had "extensive visits every week" with the two minors, who "seem[ed] to enjoy the visits."

It was noted the paternal grandmother, who was willing and prepared to adopt J.B. and I.B., had been meeting all of the minors' needs for almost two years and had a strong bond with them. The paternal grandmother expressed her willingness to continue visitation between mother and the minors even after termination of parental rights. The paternal grandmother was also willing to permit visitation between the minors and father following his release from incarceration.

The Agency recommended parental rights be terminated and the minors placed for adoption, noting mother had been provided numerous services over the past two years but had been unable to make a long term change in her lifestyle of drug abuse.

At the September 6, 2016 contested selection and implementation hearing, mother testified the minors resided with her prior to removal, during which time she participated in activities with them and read to them. She testified she was currently visiting J.B. and I.B. every weekend and sometimes during the week unless there was a scheduling conflict with the paternal grandmother. Mother stated she was still living with the

⁵ The record does not include a reporter's transcript of the March 22, 2016 hearing.

maternal great-grandmother. Mother further testified her relationship with the minors was still close; she talked to them about school and washed and massaged their feet, and they still called her “mom.” She stated she was concerned about the impact an adoption would have on her relationship with the minors.

Mother also testified she was employed and saving up to get her own place near her grandmother’s home. She stated she was still involved in a substance abuse program and, although she was terminated from drug court, she continued to participate as a volunteer.

The Agency reiterated its recommendation that parental rights be terminated and the minors placed for adoption. With regard to the beneficial parental relationship exception (§ 366.26, subd. (c)(1)), the Agency acknowledged mother’s visitation was consistent and beneficial to the minors, but argued her failure to complete a substance abuse program after two years and her request for extended long-term reunification, would delay permanence for the minors and not be beneficial for them.

Minors’ counsel agreed with the Agency, adding mother’s bond with the minors did not outweigh the stability that would be provided to them through a plan of adoption. Father’s counsel stated father was agreeable to adoption by the paternal grandmother.

Mother’s counsel opposed termination of parental rights, arguing it would be significantly detrimental if, once the minors were adopted, the adoptive parent refused to allow mother to visit the children.

The court remarked that “this is a very difficult case” and commended mother on her recent efforts, but noted she still lacked stable housing after over two years of dependency proceedings. Focusing on “stability and permanence for both [minors],” the court stated, “Unfortunately, the biggest problem is we are running out of time. We are over two years down the line. Mom is still attempting to get housing situated. She is in drug court as a volunteer which shows a lot of strength. I don’t see that a lot. I commend

her for that. She has made solid efforts. The paradigm shifted here. It is not about mom at this point. It is about stability and permanence for both boys, what is in their best interest. And absent a detriment, the attorneys have stated the correct interpretation of the law. Permanence is what the law wants us to look to, and they want us to achieve adoption, if at all possible. If not adoption, if not a guardianship, if not long term permanent placement which would not be in the minors' best interest when we have an adoptive home identified. We have had the ability to see the children in this home for a period of time. They seem to be doing very well. They love their mother and mother loves them. That is clear. It is also clear that we need to go forward. We can't stay in limbo waiting for things to clear up for mom to make sure she is on the right track and that she is not going to slip back, pardon me. [¶] So, this is tough because I have seen what [mother] has been able to do, but we are not at reunification. We are past that. They are at the point of looking at the boys and permanence for them, and adoption provides that.” The court found the minors were adoptable, it was in their best interest to terminate parental rights, and the beneficial parental relationship exception (§ 366.26, subd. (c)(1)) did not apply.

Mother filed a timely notice of appeal. She contended the juvenile court erred in failing to apply the beneficial parental relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(i)), and by failing to consider the wishes of the minors, specifically their feelings about her and their relationship with her, as required by section 366.26, subdivision (h)(1).

In this court's opinion filed May 22, 2017,⁶ we reversed and remanded for further proceedings. In so doing, we concluded the juvenile court properly considered the minors' wishes prior to terminating parental rights, but did not make the necessary

⁶ The remittitur in appellate case No. C083036 issued on July 24, 2017.

findings to determine whether the beneficial parental relationship exception applied. In that regard, we stated, “[The juvenile] court did not balance the strength and quality of mother’s relationship with the minors in a tenuous placement against the security and sense of belonging adoption by the paternal grandmother would confer, or to make express or implied findings in that regard. That is to say, the court should not have been concerned whether mother would regain custody of the minors, a factor not relevant in deciding whether the beneficial parental relationship exception applies, but rather whether the minors would be greatly harmed by termination of mother’s parental rights.” We further concluded: “The question unanswered by the juvenile court’s ruling was whether the nature and quality of mother’s relationship with the minors would be greatly harmed by termination of mother’s parental rights. Factual findings must be made in that regard in order to determine whether the beneficial parental relationship exception to adoption applied.”

On July 13, 2017, the Agency filed a status review report stating mother had “significantly stabilized,” obtained her own housing, and completed a one-year dependency drug court program and an outpatient substance abuse treatment program. Mother was very engaged in therapeutic services. The Agency recommended that family maintenance services continue.

According to the status review report filed August 2, 2017, J.B. and I.B. were doing well with the paternal grandmother and were content to stay with her. Mother had several visits with J.B. and I.B. for special occasions in March, April, and June 2017. J.B. and I.B. acted out after visiting with mother, believing if they did not have to follow the grandmother’s house rules they would be placed back with mother. The paternal grandmother remained committed to adopting both minors. The Agency continued to recommend termination of parental rights and that both minors be adopted together by the paternal grandmother.

The status report filed October 13, 2017 stated mother had been arrested in August 2017 for altering checks belonging to an elderly person for whom she provided care. The Agency again recommended that mother's parental rights be terminated.

At the October 25, 2017 uncontested hearing, the court ordered the Agency to arrange supervised visitation between mother and the minors subject to the Agency's discretion to lift the supervision requirement.

The section 366.26 report filed December 26, 2017 stated mother failed to contact the social worker or sign and return the referral form to begin supervised visitation despite the social worker's instruction to do so during a conversation with mother on October 25, 2017. A subsequent request was mailed to mother, who signed and returned it to the Agency on November 20, 2017. However, mother had not contacted the Agency to inquire when visitation would begin. The minors were comfortable being cared for by the paternal grandmother and having the paternal grandmother take on the parental role for them. Both minors wanted to be adopted by the paternal grandmother and confirmed their understanding that mother was not able to care for them. Noting mother suffered from depression, had abused methamphetamine, marijuana, and nonprescribed medications, and was recently arrested on charges of elder abuse, the Agency again recommended termination of mother's parental rights, asserting it would not be detrimental to the minors because the paternal grandmother had long been involved in the minors' lives and had taken care of them since they were babies. Arguing the minors were in need of a safe, nurturing, and permanent family to ensure their emotional, social, physical, educational, and creative needs were being met, the Agency asserted adoption would be in the minors' best interest to ensure their sense of belonging and security.

The status review report filed January 25, 2018 stated the minors continued to do well in the care of their paternal grandmother. Despite court-ordered supervised visits, mother failed to submit the forms necessary to begin visitation. Initially, staff had

difficulty contacting mother, but was eventually able to do so and to schedule the first visit two months after issuance of the court order. During a team meeting on December 21, 2017 that included mother, the minors, the paternal grandmother, staff, and others, all participants understood the plan to move toward termination of parental rights and adoption by the paternal grandmother, who indicated her willingness to maintain close communication with mother for the minors' future benefit. The minors expressed their desire to be taken care of by the paternal grandmother.

At the February 7, 2018 review hearing, the juvenile court dismissed the dependency case as to Jo.B., and granted paternal grandmother's request to travel with the minors out of the country.

The section 366.26 hearing commenced on April 16, 2018. The court stated it reviewed all reports as well as this court's opinion in case No. C083036 and, without objection, allowed all parties to make "brief comments."

In lieu of testimony from witnesses, each party presented argument to the court. The parties agreed mother had regular and consistent visits with the minors. The Agency argued that, based on the state of the evidence at the prior selection and implementation hearing on September 2016, the minors would not be greatly harmed by termination of parental rights, noting the minors "clearly indicated that they did not want to return home to their mother." Minors' counsel agreed, but noted the minors enjoyed visits with mother and stated they cared about her and loved her. Mother argued the nature and quality of her relationship with the minors so outweighed the benefits of adoption by the paternal grandmother that the minors would be greatly harmed by termination of her parental rights.

The court acknowledged that mother raised the minors for a number of years and that she initially was engaged in services and doing well. However, the court noted mother had a "very tumultuous childhood" and an extensive substance abuse issue for over 12 years for which she only sporadically received treatment. The court further

acknowledged the paternal grandmother was also involved in the minors' lives since birth, noting she too was present in the hospital when mother gave birth. The paternal grandmother had the minors a fair amount of time. The minors were "back and forth" between mother and the paternal grandmother numerous times, and the paternal grandmother provided for the minors' needs during those periods. The court also acknowledged that while the minors loved, cared about, and were affectionate with both their mother and the paternal grandmother, it was the paternal grandmother who "provided their educational needs," "[had] been to the schools, talked to the teachers, set up the tutors, the after school program, set up activities for them," and took them sailing and camping, doing these things for the minors "on a constant, ongoing basis." On the other hand, mother "has not always been available," having been incarcerated for a period of time and hospitalized on other occasions. On some occasions when the minors were in mother's care, they suffered physical abuse. For those reasons, the court noted it "can't say that the mother's bond was entirely positive." And while mother had a continuous bond with the minors, that bond waned over the course of time, "was not firm, consistent," and was sometimes "non-existent." Despite mother's considerable visitation, it was the paternal grandmother upon whom the minors were reliant for their daily care and needs.

The court found as follows: "[B]ecause of the mother's continuing issues with [the] mental health component, substance issues that went on for a number of months prior to the termination of services, I can't find that her relationship is of such strength that it would be so detrimental to these minors that we should not look to stability for these minors for permanence, which is what I believe they are in need of at this point. I don't find the mother has met her burden in this case. I believe [the] minors are in the best possible situation. That they are cared for by an individual relative that has demonstrated over the long haul from their birth the commitment and consistency that is required. The bond is the issue. And I believe the strongest bond unifying and binding

element in force with these minors is the relationship with the guardian. I don't feel that the mother's bond with them over time has demonstrated that strength; so, I feel that the beneficial parental rights relationship exception does not apply in this matter and the .26 finding will be re-affirmed at this time." Finding the beneficial parental relationship exception did not apply, the court reaffirmed its prior ruling terminating mother's parental rights.

DISCUSSION

I

Beneficial Parental Relationship Exception

Mother contends the juvenile court erred in finding the beneficial parental relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(i)) does not apply. She claims there was substantial evidence in the record to establish that she maintained regular visitation and contact with the minors and the minors would benefit from continuing the relationship.

“ ‘At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must make one of four possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption.* [Citation.]’ [Citations.] If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child.” (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.)

There are only limited circumstances permitting the court to find a “compelling reason for determining that termination [of parental rights] would be detrimental to the child” (§ 366.26, subd. (c)(1)(B).) One of these is where the parent has maintained regular visitation and contact with the child *and* the child would benefit from continuing the relationship, often referred to as the beneficial parental relationship exception. (§ 366.26, subd. (c)(1)(B)(i).)

The party claiming the exception has the burden of establishing the existence of any circumstances that constitute an exception to termination of parental rights. (*In re C.F.* (2011) 193 Cal.App.4th 549, 553 (*C.F.*).) The factual predicate of the exception must be supported by substantial evidence, but the juvenile court exercises its discretion in weighing that evidence and determining detriment. (*In re K.P.* (2012) 203 Cal.App.4th 614, 622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.)

The benefit to the child must promote “the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*); accord, *C.F.*, *supra*, 193 Cal.App.4th at p. 555; *In re B.D.* (2008) 159 Cal.App.4th 1218, 1234-1235; *In re Helen W.* (2007) 150 Cal.App.4th 71, 81; *In re L. Y. L.* (2002) 101 Cal.App.4th 942, 953.) The exception “must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs are some of the variables which logically affect a parent/child bond.” (*Autumn H.*, at pp. 575-576.)

“On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order.” (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

The parties do not dispute that there is sufficient evidence in the record to support the first prong of the beneficial parental relationship exception – that mother maintained regular visitation and contact with the minors and enjoyed a loving relationship with them. (§ 366.26, subd. (c)(1)(B)(i).)

With regard to the second prong – whether the minors would benefit from continuing the relationship with mother (§ 366.26, subd. (c)(1)(B)(i)) or, put another way, whether “the relationship promotes the well-being of the minors to such a degree as to outweigh the well-being the minors would gain in a permanent home with” the paternal grandmother (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575) – mother claims the juvenile court failed to address the detriment that would result from the termination of the minors’ close relationship with her and instead erroneously focused on the minors’ attachment to the paternal grandmother. We disagree.

As it did at the original section 366.26 hearing, the juvenile court properly focused on stability and permanency for the minors and the fact the dependency proceedings had gone on for over two years. However, whereas the first time the court was erroneously focused on whether mother would regain custody of the minors, this time the court properly focused on whether the minors would be greatly harmed by termination of mother’s parental rights. In that regard, the court considered the parties’ oral arguments and the evidence in the reports. The reports stated the minors enjoyed their visits with mother and suffered no apparent adverse effects from contact or time spent with her. Mother participated in activities with the minors during visits, washed and massaged their feet, rubbed their heads and tickled their backs, and talked about school. The minors “opened up and talked to her about anything and expressed how they were feeling.” The minors were doing well emotionally and physically in the paternal grandmother’s care. They participated in outdoor activities. The paternal grandmother also took the minors out for meals, watched movies, listened to music, and attended events together. Both minors expressed their desire to remain with the paternal grandmother.

Following the initial section 366.26 hearing, it was reported mother had “significantly stabilized,” obtained her own housing, completed a one-year dependency drug court program and an outpatient substance abuse treatment program, and was very engaged in therapeutic services. However, she was arrested in August 2017 for check fraud. The minors were reportedly acting out after visits with mother.

It was also reported that mother’s consistent visitation waned to some degree following her August 2017 arrest, as evidenced by her initial failure to contact the social worker or sign and return the referral form to begin supervised visitation and, after eventually signing and returning the referral form, her failure to contact the Agency to inquire about when visitation would begin. The minors continued to thrive in the paternal grandmother’s care and were comfortable with her taking on the parental role for them. Both minors expressed their desire to be cared for and adopted by the paternal grandmother.

At the hearing, mother argued she maintained regular visitation with the minors. The minors continued to call her “mom” and hugged and kissed her and told her they missed her after time spent apart. Mother further argued she was the only person who had been in the minors’ lives since birth and noted the minors opened up and talked to her and expressed their feelings to her. Mother stated her concerns the paternal grandmother could move away and would no longer have any obligation to keep mother informed about the minors. She also noted that, while she was currently living with the maternal grandmother, she was employed and saving for her own home and was participating in substance abuse treatment. Mother argued that, if she were not in the minors’ lives, the minors would be greatly harmed. Mother did not seek return of the minors to her care; rather, she urged that the minors could achieve stability by being in a guardianship with the paternal grandmother.

The record makes plain the court “look[ed] at the entire case” and balanced the strength and quality of the relationship between mother and the minors in a tenuous

placement against the security and the sense of belonging life with the paternal grandmother would confer by examining variables affecting the bond between mother and the minors, including the portion of the minors' lives spent in mother's custody, the positive and negative effects of interaction between mother and the minors, and the minors' particular needs. (*Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.) For example, the court first acknowledged mother raised the minors for a number of years. The court noted, however, mother had a "very tumultuous childhood," an extensive substance abuse issue for over 12 years for which she only sporadically received treatment, and was hospitalized at some point for depression. As a result, the minors were often shuffled between mother and the paternal grandmother throughout the course of their lives. Therefore, it was the paternal grandmother who cared for the minors and provided for their needs for a significant portion of their lives.

The court also acknowledged that while it was undeniable the minors loved, cared about, and were affectionate with their mother, mother was not always available to care for the minors, having been incarcerated for a period of time and hospitalized on other occasions. At times, mother required supervision during visits with the minors or failed to visit at all. More importantly, there were occasions when the minors suffered physical abuse while in mother's care. For those reasons, the court felt mother's bond was not entirely positive. Further, the court noted, mother's bond with the minors waned over the course of time and was sometimes inconsistent or even "non-existent."

On the other hand, the court found that while the minors could not always rely on mother, they could rely on the paternal grandmother, who provided for their day-to-day needs, took them on outings, facilitated their participation in activities, and did things for them "on a constant, ongoing basis."

The court concluded that, in light of the evidence and "mother's continuing issues with [the] mental health component [and] substance issues that went on for a number of months prior to the termination of services," mother's relationship with the minors was

not so strong as to cause substantial harm and detriment to the minors if her parental rights were terminated.

Having made the appropriate and necessary findings, the juvenile court did not err in finding the beneficial parental relationship exception does not apply.

II

Evidence at Section 366.26 Hearing

Mother contends, alternatively, the order terminating her parental rights must be reversed because the juvenile court improperly considered evidence presented by the Agency but limited mother's participation to making only brief comments. Mother mischaracterizes the record.

At the onset of the April 16, 2018 hearing, mother's counsel requested the opportunity to address the court prior to making its final determination adding, "I have argument. I will reserve." The court stated, "I have reviewed court documents. I have reviewed all of the reports, including the juris/dispo and all of the reports through the .26. And I have also reviewed the appellate court's decision." The court added, "I would allow parties to make brief comments on this." The Agency requested that the court find the minors would not be greatly harmed by termination of mother's parental rights and stated it believed "that finding needs to be made based upon [the] state of the evidence of September 2016," at which time the minors had "clearly indicated that they did not want to return home to their mother."

Without objecting to the court's direction regarding the procedural aspects of the hearing, mother's counsel proceeded to argue on behalf of mother, first stating her view of this court's opinion on remand and then arguing the record established mother's lengthy, close relationship with the minors and they would be greatly harmed if mother were not in their lives. Counsel also argued the minors "could achieve stability in their lives by being in a guardianship with the [paternal] grandmother." Finally, mother's

counsel opposed the Agency's recommendations regarding the proposed permanent plan of adoption following termination of parental rights.

Mother contends the court precluded her from addressing the Agency's evidence other than in brief comments. Not so. As set forth above, mother's counsel informed the court she wanted the opportunity to present oral argument. In fact, counsel did just that. Counsel did not, however, request more time or seek to cross-examine the authors of reports received and considered by the court, nor was she cut off by the court or otherwise prohibited from addressing the evidence presented in the reports.

Mother further contends any failure to object at the hearing was the product of ineffective assistance of counsel.

A claim of ineffective assistance of counsel may be reviewed on direct appeal when there is no satisfactory explanation for trial counsel's act or failure to act. (*In re N.M.* (2008) 161 Cal.App.4th 253, 270.) To prevail on such a claim, mother must demonstrate: "(1) counsel's representation fell below an objective standard of reasonableness; and (2) the deficiency resulted in demonstrable prejudice." (*In re Kristen B.* (2008) 163 Cal.App.4th 1535, 1540.) We must affirm the judgment unless the record "affirmatively establishes counsel had no rational tactical purpose for the challenged act or omission" (*Id.* at p. 1541.) In addition, we may reject mother's claim if she cannot show it is reasonably probable the result would have been more favorable to her but for trial counsel's alleged failings. (*In re N.M.*, at p. 270.) Thus, if mother fails to demonstrate prejudice, we need not examine whether her counsel's performance was deficient. (*Ibid.*)

Here, mother has not demonstrated that, had her attorney been given additional time to argue, the result would have been more favorable to her. As previously discussed, mother's counsel argued against termination of parental rights and for application of the beneficial parental relationship exception. Knowing the court considered the Agency's reports that included facts both favorable and unfavorable to

mother's case, counsel focused the court's attention on the nearly eight years mother cared for the minors prior to detention, the strong bond between mother and the minors, and mother's regular visitation with the minors. Counsel noted mother was employed and saving money to obtain her own housing, and was involved in substance abuse treatment. Counsel also emphasized portions of mother's prior testimony regarding the fact the minors shared their thoughts and emotions with mother and missed her when they were not with her. It is clear the court considered the points raised by counsel, all of which were already before it either in previous reports or through mother's testimony, but nonetheless concluded the entirety of the evidence demonstrated mother's relationship with the minors was not so strong as to cause substantial harm and detriment to the minors if her parental rights were terminated. Based on this record, mother has not demonstrated prejudice. Therefore, her claim of ineffective assistance of counsel fails.

DISPOSITION

The juvenile court's orders are affirmed.

_____/s/
HOCH, J.

We concur:

_____/s/
BUTZ, Acting P. J.

_____/s/
DUARTE, J.